

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

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WILLIAM LEFEBVRE,)
)
Plaintiff,)
)
v.) Case No. 5:12-cv-163
)
ANDREW PALLITO, ADAM MICHEL,)
MARK POTANAS, and)
JOSHUA RUTHERFORD,)
)
Defendants.)

**OPINION AND ORDER ADOPTING IN PART MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION**

(Docs. 17 & 23)

This matter came before the court for a review of the Magistrate Judge's December 17, 2012 Report and Recommendation ("R & R") in the above-captioned matter (Doc. 23). Defendants, who are officials at the Vermont Department of Corrections, have filed a motion to dismiss Plaintiff's claim that they failed to protect him from another inmate during his incarceration. Plaintiff did not respond to that motion. Neither party has objected to the R & R, and the deadline for doing so has expired.

A district judge must make a *de novo* determination of those portions of a magistrate judge's report and recommendation to which an objection is made. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1); *Cullen v. United States*, 194 F.3d 401, 405 (2d Cir. 1999). The district judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1); *accord Cullen*, 194 F.3d at 405. A district judge, however, is not required to review the factual or legal conclusions of the magistrate judge as to those portions of a report and

recommendation to which no objections are addressed. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation. See *Campbell v. United States Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974), *cert. denied*, 419 U.S. 879 (1974).

Plaintiff has filed a claim under 42 U.S.C. § 1983, claiming that Defendants failed to protect him from harm inflicted by a fellow inmate who allegedly sexually assaulted Plaintiff and thereafter repeatedly physically and verbally threatened him. Plaintiff alleges that he reported these incidents to Defendants, or some of them, to no avail. Plaintiff further alleges that he filed multiple grievances to which the Defendants failed to adequately respond.

In his twenty-four page R & R, the Magistrate Judge carefully reviewed the factual record and recommended that Defendants' motion to dismiss (Doc. 17) be granted, with leave for Plaintiff to file an amended complaint. He concluded that Defendants were immune from suit under the Eleventh Amendment to the United States Constitution for any claims brought against them in their official capacities. He further found that Plaintiff had failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act of 1995. The court agrees with these conclusions and orders dismissal of Plaintiff's claim on that basis, with leave to file an amended complaint. In addition, the court agrees with the Magistrate Judge that Defendants' motion to dismiss for failure to allege a physical injury should be denied. The court need not and does not adopt the remainder of the Magistrate Judge's conclusions.

The court GRANTS IN PART and DENIES IN PART Defendants' motion to dismiss (Doc. 17). Plaintiff has already filed an amended complaint on January 9, 2013 in response to the R & R's recommendation that leave to amend be granted.

SO ORDERED.

Dated at Rutland, in the District of Vermont, this 25th day of February, 2013.



Christina Reiss, Chief Judge
United States District Court